IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6020

MICHAEL M. BUSIC,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals and its Supplemental Opinion Sur Rehearing are reported at 587 F.2d 577 and may be found in the joint Appendix (A. 36, 57). The opinion of the Distict Court is unreported and may be found in the joint Appendix (A. 21).

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1978; thereafter, the Government's petition for rehearing was granted, and the judgment on rehearing was entered on December 12, 1978. The petitions for writ of certiorari and motion to proceed in forma pauperis were filed on February 2, 1979 and granted on June 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Did Congress authorize prosecution under 18 U.S.C. 924(c) (use or carrying of a firearm during the commission of a federal felony) when an underlying violation with firearms of 18 U.S.C. §111 (assault on federal officers with firearms) was already subject to an enhanced penalty.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The United States Constitution, Fifth Amendment

> "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

2. 18 U.S.C. §924(c)

> "(c) Whoever
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

3. 18 U.S.C. §111

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

STATEMENT OF THE CASE

For simplicity, petitioner incorporates the summary of evidence contained in the Opinion of the United States Court of Appeals for the Third Circuit (A. 36). Those portions of the Opinion discussing matters not material to the issues raised herein are omitted.

> "Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob 'front money' from an undercover agent. This attempted robbery culminated in a shootout with federal agents.
>
> * * *
>
> "Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the defendants and received samples of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some 'front money'. A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

> "As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immedately arrested and disarmed.
>
> "Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box contining ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment.
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> * * *
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> "The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being

convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having *used* (emphasis in the original) a firearm to commit the drug conspiracy and assaults on federal officers in violation of §924(c)(1); Busic for having *carried* (emphasis in the original) a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts—all to run consecutively to each other—for a total of 30 years for each defendant."

In its Supplemental Opinion Sur Rehearing (A. 57), the Third Circuit Court of Appeals rejected petitioner Busic's contention that as a matter of statuatory construction and in view of this Court's decision in the case of *Simpson* v. *United States*, 435 U.S. 6 (1978) 18 U.S.C. §924(c) does not apply in those cases where the penalty for an underlying felony (here 18 U.S.C. §111) was already enhanced for the use of a dangerous weapon. The lower court held in petitioner Busic's case, that *Simpson* does not proscribe the imposition of consecutive sentences under §§111 and 924(c)(2). In so holding, it made a technical distinction between the two subsections of §924. However, it also recognized that *Simpson* had no occasion to differentiate between the two subsections of §924(c). The judgment of sentence as to petitioner Busic was affirmed.

As to petitioner LaRocca, the lower court, on the basis of this Court's decision in *Simpson* remanded

for resentencing. On remand, the Government may elect to proceed under either §924(c)(1) or §111, but not both. In its original opinion, the Third Circuit Court of Appeals reached the same result in La-Rocca's case on the basis of Double Jeopardy.

ARGUMENT

Introduction

Petitioner Busic (hereinafter "Busic") contends that the Supplemental Opinion Sur Rehearing of the Third Circuit Court of Appeals misinterprets and misapplies this Court's decision and rationale in *Simpson* v. *United States,* 435 U.S. 6 (1978) (hereinafter "*Simpson*"). Both Busic and the Government urge this Court to clarify *Simpson.* Busic contends that the *Simpson* holding and rationale precludes not only the imposition of an additional consecutive sentence, but also the initial prosection under §924(c) when a defendant has committed an underlying federal felony which already permits the sentencing court to impose an enhanced penalty for the use of a firearm. In opposition, the Government urges this Court to expressly state that prosecutors have the discretion to charge, and the Courts have the power to sentence, under either the enhancement provisions of the underlying felony or the provisions of §924(c). (PET. U.S. 7).[1]

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[1] PET. U.S. refers to the Government's response to appellant's Petition for Writ of Certiorari. The document submitted by the Government is entitled Brief for the United States.

Preliminarily, reference is made to the difference in treatment accorded to Busic and petitioner LaRocca (hereinafter "LaRocca") in the Third Circuit. LaRocca's case is remanded for resentencing under either §§111 or 924(c). Busic's conviction and sentence is affirmed on the ground that his conviction was for §924(c)(2), the "carrying" subsection, as opposed to the "using" subsection of §924(c)(1), under which LaRocca was convicted and sentenced.

Obviously, "using" a firearm normally includes and encompasses "carrying" a firearm. It is hard to conceive of different circumstances in a "using" and a "carrying" violation. If permitted to stand, this distinction would lead to unique and inequitable results. A "user" may receive only one conviction and sentence; a "carrier" may receive multiple convictions and consecutive sentences. As to Busic who did not draw or use his weapon, this is the impact on the instant case. This interpretation would be an invitation to prosecutors to seek multiple convictions and consecutive sentences in avoidance of *Simpson* by indicting for the underlying felony and for violation of §924(c)(2) (carrying).

At the very least, Busic seems entitled to the same treatment as LaRocca. However, the factual distinctions between the subsections has only limited impact in this case. Busic's principle contention is that §924(c) does not apply where the underlying offense already contains a sentencing enhancement provision for use of a firearm. This is true not only in the sentencing context of *Simpson*, but in the use of the statute for prosecution.

I.

The Legislative History of §924(c) Establishes that Congrss Did Not Intend the Statute to Apply When the Underlying Federal Offense Provides Enhanced Punishment for Use of a Firearm.

This Court considered *Simpson* to resolve apparent conflicts between the decisions among the circuits. *See* also *United States* v. *Eagle*, 539 F.2d 1166 (8th Cir. 1976), *United States* v. *Crew*, 538 F.2d 575 (4th Cir. 1976), and *Perkins* v. *United States*, 526 F.2d 688 (5th Cir. 1976). The Eighth Circuit's decision in *Eagle* involved the interplay between §924(c) and 18 U.S.C. §1153 (assaulting an Indian on a reservation) which carries an enhanced penalty for using a firearm. Based on the legislative history of §924(c), the *Eagle* court stated:

> "The sections of Title 18 enumerated by Representative Poff (except Chapter 44) have this in common: all impose a higher penalty for the felony specified if that is committed with a 'dangerous' or 'deadly' weapon. Representative Poff's remarks evidence a clear congressional intention that the new statute not be applicable in cases involving statutes of this type.
>
> This intention accords with the deterrence rationable of §924(c)(1). *It is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive*

> *statute itself does so* . . . The existing statutes, by providing federal sanctions only if firearms are used, perform the function of deterrence. Application of §924(c)(1) to the crime is not necessary, and apparently was not intended by Congress.
>
> We thus conclude that a crime of the type charge in count I, i.e., one for which the penalty is enhanced by the use of a dangerous weapon, *cannot form the basis of a prosecution under §924(c)(1).*" *Eagle*, 539 F.2d at 1171, 1172. (emphasis added)

A reasonable reading of *Simpson* indicates that this Court adopted the *Eagle* rational in evaluating the legislative history of §924(c). Ambiguity arises because the *Simpson* Court remanded the case for further consistent proceedings without expressly vacating the the conviction under §924(c). It should be noted that the *Simpson* petitioners did not ask to have the firearms conviction vacated because such contention would not have been in their best interests. The larger sentences had been imposed for the underlying bank robbery. It remains to evaluate this Court's interpretation of the legislative history of §924(c) to determine whether there is any basis for the Third Circuit's conclusion (and the Government's contention) that the prosecutors and the courts have any "option" to use §924(c).

It is respectfully submitted that nothing could be plainer than what this Court said about the legislative history of §924(c) in *Simpson*. The best vehicle for

expressing this is to set forth this Court's exact language regarding legislative history, omitting only portions relating to other aspects:

> "First is the *legislative history of §924(c).* That provision, which was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff. 114 cong. Rec. 22231 (1968).[7] In his statement immediately following his introduction of the amendment, Representative Poff observed:
>
> > 'For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.' *Id.*, at 22232.

This statement is clearly probative of a legislative judgment that the purpose of §924(c) is already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon.[8] Although these remarks are of

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[7] Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports.

[8] Title 18 U.S.C. §§111, 112, and 2231 provide for an increased maximum penalty where a 'deadly or dangerous weapon' is used to commit the substantive offense. Title 18 U.S.C. §§113(c) and 2114 enhance the punishment available for commission of the substantive offense when the defendant employs a 'dangerous weapon.'

course not dispositive of the issue of §924(c)'s reach, they are certainly entitled to weight, coming as they do from the provision's sponsor. This is especially so because Representative Poff's explanation of the scope of his amendment is in complete accord with, and gives full play to, the deterrence rationale of §924(c). *United States* v. *Eagle*, 539 F.2d, at 1172. Subsequent events in the Senate and the Conference Commmittee pertaining to the statute buttress our conclusion that Congress' view of the proper scope of §924(c) was that expressed by Representative Poff. Shortly after the House adopted the Poff amendment, the Senate passed an amendment to the Gun Control Act, introduced by Senator Dominick, that also provided for increased punishment whenever a firearm was used to commit a federal offense. 114 Cong. Rec. 27142 (1968). According to the analysis of its sponsor, the Senate amendment, contrary to Mr. Poff's view of §924(c), would have permitted the imposition of an enhanced sentence for the use of a firearm, in the commission of any federal crime, even where allowance was already made in the provisions of the substantive offense for augmented punishment where a dangerous weapon is used. *Id.*, at 27143. A Conference Committee, with minor changes, subsequently adopted the Poff version of §924(c) in preference to the Dominick amendment. H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31-32 (1968) . . .

The legislative history of §924(c) is of course sparse, yet what there is—particularly Representative Poff's statement and the Committee rejection of the Dominick amendment—points in

the direction of a congressional view *that the section was intended to be unavailable in prosecutions for violations of §2113(d).* Even where the relevant legislative history was not nearly so favorable to the defendant as this, this Court has steadfastly insisted that 'doubt will be resolved against turning a single transaction into multiple offenses.' *Bell* v. *United States*, 349 U.S. 81, 84 (1955); *Ladner* v. *United States*, 358 U.S. 169 (1958). See *Prince* v. *United States*, 352 U.S. 322 (1957). As we said in *Ladner*: 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' 358 U.S., at 178. If we have something 'more than a guess' in this case, that something—Representative Poff's commentary and the Conference Committee's rejection of the Dominick amendment—is incremental knowledge that redounds to petitioners' benefit, not the Government's.

. . . Indeed, at one time, the Government was not insensitive to these concerns respecting the availability of the additional penalty under §924(c). In 1971, the Department of Justice found the interpretive preference for specific criminal statutes over general criminal statutes of itself sufficient reason to advise all United States Attorneys not to prosecute a defendant under §924(c)(1) where the substantive statute the defendant was charged with violating already 'provid(ed) for increased penalties where a firearm is used in the penalties where a firearm is used in

the commission of the offense.' 19 U.S. Attys. Bull. 63 (U.S. Dept. of Justice, 1971).

Obviously, the Government has since changed its view of the relationship between §§924(c) and 2113(d). We think its original view was the better view of the congressional understanding as to the proper interaction between the two statutes. Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c). The cases are therefore reversed and remanded to the Court of Appeals for proceedings consistent with this opinion." *Simpson*, 435 U.S. at 13-16. (emphasis added).

II.

In the Absence of Clear Legislative History Permitting Multiple Prosecutions and Punishments for a Single Act, Such Multiple Prosecutions and Punishments Are Prohibited.

As in *Simpson*, this type of case raises substantial Double Jeopardy issues. *See Brown* v. *Ohio*, 432 U.S. 161 (1977); *Jeffers* v. *United States*, 432 U.S. 138 (1977); *Iannelli* v. *United States*, 420 U.S. 770 (1975); *Gore* v. *United States*, 357 U.S. 386 (1958); *Blockburger* v. *United States*, 285 U.S. 299 (1932) There is a possible need to evaluate the statutes in the light of *Blockburger* and subsequent cases.

However, as in *Simpson*, such analysis seems unnecessary in view of the consistent practice of this Court to avoid Double Jeopardy decisions (or other

Constitutional decisions) where possible by determining whether Congress *intended* to subject a defendant to multiple convictions and penalties for a single criminal transaction. *Simpson* did not reach the Constitutional issues because of the Court's conclusions as to legislative intent. The Court stated three grounds: 1) The legislative history reflects the judgment that the purposes of §924(c) are already served when the substantive federal offense provides enhanced punishment for use of a dangerous weapon; 2) Any ambiguity concerning the ambit of a criminal statutes should be resolved in favor of lenity; 3) Precedence is given to the terms of a more specific statute where general and specific statutes speak to the same concern.

All three considerations apply to this case and apply not only to bar multiple sentences but prosecution as well. In cases involving Double Jeopardy issues, this Court normally requires a strong and persuasive showing of legislative intent. It is unclear whether this practice of construction arises from the nature of the Double Jeopardy clause, or as a matter of policy pertaining to the function of the Court in the judicial process.[2] In *Simpson* and in other cases, the Court has characterized this as a rule of lenity. *See* also

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[2] *See* "Toward a General Theory of Double Jeopardy" by Peter Westen and Richard Drubel, *Supreme Court Review* (1978). The authors suggest this practice arises from the Double Jeopardy clause itself rather than a matter of policy. This article contains a comprehensive review of all facets of Double Jeopardy law with suggestions for future development.

Gore v. *United States; Supra; Callanan* v. *United States*, 364 U.S. 587, 596. This process requires a clear showing of congressional intent and such intent will not be discerned when there is nothing more to support it than a "guess". *Ladner* v. *United States*, 358 U.S. 169 (1958). *See* also *Bell* v. *United States*, 349 U.S. 81, 84.

The case of *Jeffers* v. *United States*, 432 U.S. 137 (1977) and *Iannelli* v. *United States*, 420 U.S. 770 (1975) are instructive. In *Jeffers*, the defendant was tried and convicted on charges of conspiracy to distribute drugs and with distributing drugs in concert with five or more persons. After conviction, the defendant was given multiple sentences which exceeded the maximum for the greater offense. A plurality of this Court set aside the conviction because of the absence of legislative intent to permit separate punishments. The plurality termed the legislative history "inconclusive". *See Jeffers* v. *United States*, 432 U.S. 137 (1977).

In *Iannelli*, this Court permitted multiple punishments for conspiracy to commit gambling violations and for the substantive violations of engaging in gambling enterprise with five or more persons. This was contrary to Wharton's Rule which appeared to bar conspiracy conviction where the substantive crime requires the participation of two or more persons. This Court found a "clear and unmistakable" legislative intent that the conspiracies and substantive violations could be punished as multiple offenses. 420 U.S.

at 785, 786. For the most part, the above discussion relates to multiple sentences. However, it is clear that the rule of lenity applies to the scope and applicability of statutes for prosecution purposes. This Court has so held. *United States* v. *Bass*, 404 U.S. 336, (1971), *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

III.

The Same Legislative History Which Precludes Multiple Punishment Under §924(c) Also Bars Prosecution.

In this case, it cannot be said that there is any showing of a clear intent to permit multiple sentences (or even convictions). This Court has established this in *Simpson*. To the contrary, the *Simpson* court cites and relies upon abundant evidence that the congressional intent was to *prohibit* separate prosecution *and* sentence. Representative Poff made his statement for the purpose of legislative history. His statement could not have been more explicit. Thus, two conclusions must be reached: 1) The Government *cannot* show clear congressional intent to permit multiple prosecutions and sentences; 2) The legislative history as accepted by this Court establishes exactly the opposite and, if applied, bars not only multiple sentences but prosectuion.

Of course, *Simpson* concerns the sentencing context and the instant case concerns prosecution itself. Regardless of any differences in context, the legislative history goes precisely to the same point. There can be

no showing of congressional intent to permit multiple punishments because the legislative history shows the express intent that §924 cannot be used to prosecute in any case already covered by a statute containing a sentencing enhancement provision.

CONCLUSION

For the foregoing reasons, it is hereby requested that this Honorable Court vacate petitioner Michael M. Busic's conviction for 18 U.S.C. §924(c)(2).

Respectfully submitted,

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